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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5581

RICHARD GUY STEFFEL,

Petitioner,

v.

JOHN R. THOMPSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
QUESTION PRESENTED	3
STATEMENT	3
SUMMARY OF ARGUMENT	8
ARGUMENT:	
I. The Decision of the Court of Appeals Must Be Reversed, Because the Court Erroneously Construed *Younger v. Harris* and *Samuels v. Mackell* as Creating New Law and Misapplied to Those Decisions To Deny Declaratory Relief in a Case in which there Was No Pending State Criminal Prosecution.	11
II. The Judgment Below Must Be Reversed, Because This Is a Proper Case for the Grant of Declaratory Relief and Petitioner Is a Proper Party for Such Relief.	26
A. This Is a Proper Case for the Grant of Declaratory Relief.	26
B. Petitioner Is a "Proper Party" for Declaratory Relief.	32
III. *Cameron v. Johnson* Is Inapplicable to This Case, Because Petitioner Stated a Claim for which Declaratory Relief May Be Granted.	35
CONCLUSION	36

TABLE OF AUTHORITIES

Cases:

Allegheny County v. Mashuda Co., 360 U.S. 185 (1959) ..... 15 n. 10

Amalgamated Ford Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) 28

Anderson v. Vaughn, 327 F. Supp. 101 (D. Conn. 1971) (3 judge) ..... 26 n. 19

Beal v. Missouri Pacific RR. Co., 312 U.S. 387 (1941) ... 12 n. 6

Becker v. Thompson, et al., 334 F. Supp. 1386 (USDC ND Ga. 1972), *aff'd.* 459 F.2d 919 (5th Cir. 1972) *reh. den.* 463 F.2d 1338 (1972) (3 judges dissenting) 4

Boyle v. Landry, 401 U.S. 77 (1971) 6, 7, 32, 33

Butler v. Ellis, 203 Ga. 686, 47 S.E.2d 861 (1948) 30

Byrne v. Karglexis, 401 U.S. 216 (1971) 6

Cameron v. Johnson, 390 U.S. 11 (1968) 8, 10, 35, 36

Cameron v. Johnson, 244 F. Supp. 846 (USDC SD Miss. 1964) ..... 36 n. 23

Carmichael v. Allen, 267 F. Supp. 985 (USDC ND Ga. 1966) ..... 12 n. 6

Chicago Police Department v. Mosley, __ U.S. __ (40 U.S. L.W. 4877 (1972) ..... 10, 28, 32 n. 22

Clark v. Karrah, 223 Ga. 251, 159 S.E.2d 75 (1968) 30

Coleman v. Yokum, 442 F.2d 351 (5th Cir. 1971) ..... 20 n. 17

Constantineau v. Wisconsin, 400 U.S. 433 (1971) ..... 18 n. 15

Cooley v. Endicator, 458 F.2d 513 (5th Cir. 1972) ..... 20 n. 17

Crane v. Johnson, 242 U.S. 339 (1917) 35

Crossen v. Breckenridge, 446 F.2d 833 (6th Cir. 1971) ..... 26 n. 19

Doe v. Bolton, ____ U.S. ___, (41 U.S. L.W. 4233) (1973) 24

Dombrowski v. Pfister, 380 U.S. 479 (1965) ... 9, 11, 12, 13, 18

Douglas v. City of Jeanette, 319 U.S. 157 (1943) ..... 12 n. 6

Dyson v. Stein, 401 U.S. 200 (1971) 6, 7

Enochs v. Williams, 370 U.S. 1 (1962) ..... 15 n. 10

Fenner v. Boykins, 371 U.S. 240 (1926) ..... 12 n. 6

Great Lakes Dredge & Door Co. v. Huffman, 319 U.S. 293 (1943) 14, 15

Hague v. C.I.O., 307 U.S. 496 (1939) 35

H.J. Heinz Co. v. Owens, 189 F.2d 505 (9th Cir. 1959) ..... 15 n. 10

Helvering v. Mitchell, 303 U.S. 391 (1930) ..... 34 n. 21

Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1972) ..... 22 n. 18

Hunt v. Rodriquez, 462 F.2d 659 (5th Cir. 1972) ..... 20 n. 17

Hunter v. Allen, 286 F. Supp. 830 (USDC ND Ga. 1968), partial denial of relief on the merits *aff'd* 422 F.2d 1158 (5th Cir. 1970) reversed and remanded *sub nom*, Embry v. Allen, 401 U.S. 989 (1971) ..... 12 n. 6

Lake Carriers Association v. MacMullen, 406 U.S. 498 (1972) ..... 8, 20, 22 n. 18, 23, 26, 27

Leflore v. Robinson, 446 F.2d 715 (5th Cir. 1971) ..... 20 n. 17

Lewis v. Kugler, 446 F.2d 1343 (3rd Cir. 1971) ..... 26 n. 19

Lloyd Ltd. v. Tanner, ___ U.S. ___ (40 U.S. L.W. 4829) (1942) 28, 29

Marsh v. Alabama, 326 U.S. 501 (1946) 9, 28

McCauley v. Waterman S.S. Corp., 327 U.S. 540 (1946) ..... 15 n. 10

Milner v. Burson, 470 F.2d 870 (5th Cir. 1972) ..... 20 n. 17

Musick v. Johnson, 449 F.2d 201 (5th Cir. 1972) ..... 20 n. 17

Ott v. Mississippi Barge Line, 336 U.S. 169 (1949) ..... 15 n. 10

Palaio v. McAuliffe, 466 F.2d 1230 (5th Cir. 1972) ..... 20 n. 17

Perez v. Ledesma, 401 U.S. 82 (1971) ..... 6, 9, 25 n. 19

Public Service Commission v. Wycoff Co., 344 U.S. 327 (1952) ..... 15 n. 10

Roe v. Wade, ___ U.S. ___, 41 U.S.L.W. 4213 (1973) 23, 24

Royal Peacock Social Club v. City of Atlanta, 226 Ga. 817, 177 S.E.2d 664 (1970) 30

Samuels v. Mackell, 401 U.S. 66 (1971) ..... *passim*

Shaw v. Garrison, 467 F.2d 113 (5th Cir. 1972) ..... 20 n. 17

Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935) ..... 12 n. 6

Star Satellite v. Rosetti, 441 F.2d 651 (5th Cir. 1971) ... 20 n. 17

State of Georgia v. Rachel, 384 U.S. 780 (1966) 31, 32

Thevis v. Moore, 440 F.2d 1350 (5th Cir. 1971) ..... 20 n. 17

Thevis v. Seibs, 464 F.2d 613 (5th Cir. 1972) ..... 20 n. 17

Thoms v. Smith, 334 F. Supp. 1203 (D. Conn. 1971) .... 26 n. 19

Tomlinson v. Lefkovitz, 334 F.2d 262 (5th Cir. 1964) ..... 34 n. 21

Truax v. Raich, 239 U.S. 33 (1915) 35

Walker v. Georgia, 381 U.S. 355 (1965) 32

Williams v. Miller, 317 U.S. 599 (1942) ..... 12 n. 6

Wulp v. Corcoran, 454 F.2d 826 (1st Cir. 1971) ..... 26 n. 19

Young & Co. v. Shea, 397 F.2d 185 (5th Cir. 1968) ..... 34 n. 21
Younger v. Harris, 401 U.S. 37 (1971) ..... *passim*
Zwickler v. Koota, 389 U.S. 241 (1969) ..... 18, 26 n. 19
Zwicker v. Koota, 261 F. Supp. 985 (USDC ED NY. 1966) ..... 18 n. 14

Statutes and Constitutional Provisions:

28 U.S.C. §1254(1) 2
28 U.S.C. §1341 ..... 16 n. 12
28 U.S.C. §1343 ..... 4, 35
28 U.S.C. §2201 4
28 U.S.C. §2202 ..... 4, 14 n. 9, 16 n. 13
28 U.S.C. §2283 ..... 16 n. 11
42 U.S.C. §1983 ..... 4, 35
26 Ga. Code Ann. §1503 ..... 3, 9, 10, 26, 31, 34
26 Ga. Code Ann. §3002 31
26 Ga. Code Ann. §3005 31
55 Ga. Code Ann. §102 30
110 Ga. Code Ann. §1101, *et seq.* 30
First Amendment, United States Constitution ..... *passim*
Fourteenth Amendment, United States Constitution 2

Other Authorities:

Borchard, "Judicial Relief for Peril and Insecurity," 45 Harv. L.R. 793 (1931) 25, 30
Committee Notes, Code of Georgia Annotated, Chapter 26-15, "Criminal Damage to Property", 99-101 31
Note, "The Supreme Court, 1970 Term," 85 Harv. L. Rev. 304 (1971) ..... 7 n. 5, 19 n. 16

Scott Hudgens, an Individual, and Local 315, Retail, Wholesale & Department Store Union, AFL-CIO Decision and Order, Case 10-CA-8823, August 16, 1971, at 6, 192 NLRB No. 111 ..... 36 n. 22

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 459 F.2d 919 (1972), and may be found in the separate appendix at 44 through 55. The order and opinion denying rehearing *en banc* is reported at 463 F.2d 1338 (1972), and may be found in the separate appendix at 56 through 60. The opinion of the United States District Court for the Northern District

of Georgia is reported at 334 F. Supp. 1386 (1972),[1] and may be found in the separate appendix at 36 through 41.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 3, 1972, and motion for rehearing *en banc* was denied on July 20, 1972 (A. 56). The petition for writ of certiorari was filed in this Court on October 17, 1972, and certiorari was granted on February 26, 1973.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 United States Code, Section 1254(1), review of a judgment of the United States Court of Appeals for the Fifth Circuit being sought.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution.

This case also involves the following United States statute:

28 United States Code, Section 2201:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

This case further involves the following State of Georgia statute:

26 Georgia Code Annotated, Section 1503:

"Criminal trespass. — (a) . . .

(b) A person commits criminal trespass when he knowingly and without authority:

* * * * *

(2) enters upon the land or premises of another person, . . .after receiving, prior to such entry, notice from the owner or rightful occupant that such entry is forbidden; or

(3) Remains upon the land or premises of another person, . . .after receiving notice from the owner or rightful occupant to depart.

(c) A person convicted of criminal trespass shall be punished as for a misdemeanor."

(Acts 1968, pp. 1249, 1285; 1969, pp. 857, 859.)

QUESTION PRESENTED

Whether the standards set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971), may be applied to deny petitioner declaratory relief, where there was no pending state criminal prosecution.

STATEMENT

Petitioner, RICHARD GUY STEFFEL, on October 16, 1970, brought an action in the United States District Court for the Northern District of Georgia on behalf of

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[1]The opinions below are reported *sub nom. Becker v. Thompson, et al.* Petitioner, RICHARD GUY STEFFEL, appealed from the order and judgment of the District Court and sought review in this Court, and accordingly, the caption and style of the case has been changed to bear his name. Ms. SANDRA LEE BECKER, a plaintiff below, did not appeal.

himself and members of the class which he represented (A. 5).[2] The jurisdiction of the court was invoked pursuant to the provisions of 28 United States Code, Sections 1343, 2201, 2202, and 42 United States Code, Section 1983(a). Petitioner sought a declaratory judgment as well as injunctive relief against the operation and threatened operation and enforcement of the Georgia trespass statute, *supra*, at 3, as applied to his conduct (A. 5). Petitioner claimed that the trespass statute was invoked against him in violation of the free speech provisions of the First Amendment, as the same are made applicable to the State of Georgia through the Fourteenth Amendment (A. 5).

This Action was brought against respondents, John R. Thompson, Solicitor of the Civil and Criminal Court of Dekalb County; F. D. Hand, Chief of Police of Dekalb County who has jurisdiction over the unincorporated area of that county; D. Scott Hudgins, Jr., d/b/a North Dekalb Shopping Center; and G. T. Reynolds, manager and agent for North Dekalb Shopping Center (A. 6, 7).

The material facts giving rise to this controversy are not disputed, and the Court of Appeals summarized them thusly:

"... The action takes place at the North Dekalb Shopping Center. It is a large, modern, retail

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[2]Other plaintiffs named in this action were: Sandra Becker and the Atlanta Mobilization Committee, an unincorporated association of approximately 50 active members engaged in educational and organizing efforts to influence United States policy in Southeast Asia (A. 6). Ms. Becker, an eighteen year old waitress at the Western Sizzling Steakhouse, was arrested pursuant to the trespass statute, and a prosecution was pending against her at the time the action was filed. Neither Ms. Becker nor the Atlanta Mobilization Committee appealed the District Court's denial of both injunctive and declaratory relief (A. 43).

shopping area located in a partially residential, partially small business area of unincorporated North Dekalb County, Georgia. It contains a large parking lot and a totally covered air conditioned building complex housing more than sixty retail tenants surrounded by a wide exterior sidewalk.

"Since its opening in 1965 the Center has enforced its regulations against handbilling because it desired to maintain an attractive place for its customers to shop without interference or irritation. The Boy Scouts and local garden clubs are permitted to use the booths inside the Mall for bake sales and to give information concerning their activities.

"On October 8, 1970, . . . Steffel, Becker and others stood on the exterior sidewalk of the Center and distributed hand bills informing passersby of a meeting protesting the war in Indo-China. [They] were soon instructed by a Center private security guard that they could not distribute the hand bills and were ordered to leave. When they refused the Dekalb County Police were called. When the police arrived [Steffel and Becker] were informed that, if they did not stop distribution of hand bills, they would be arrested. [They] left and no arrests were made.

"On October 10, 1970, an attorney for [Steffel and Becker] asked the manager of the Center to permit them to distribute anti-war handbills. Permission was refused. Nevertheless, Steffel and Becker returned to the Center and again, in an orderly fashion, distributed handbills from the exterior sidewalk while other members of the group[3] made photographs. Steffel and Becker were again advised

[3]The reference to "other members of the group" refers to an attorney with the local community legal aid society who took photographs (R. 157).

by the security guard and the Center's manager that they could not distribute the handbills, and that, if they persisted in doing so, they would be arrested. Ultimately the Dekalb County Police arrived and told Becker and Steffel to discontinue their activity or they would be arrested. Steffel left to avoid arrest. Becker continued to distribute the handbills[4] and was arrested on a charge of criminal trespass, pursuant to the provisions of Ga. Code §26-1503."

In obedience to the Georgia trespass statute, Steffel made no further direct effort to distribute handbills at the shopping center and stayed away.

The District Court held a hearing on the motion for preliminary injunction on October 28, 1970, but did not render a decision of Steffel's claims until after the opinions of this Court were announced in *Younger v. Harris*, 401 U.S. 37 (1971), *Samuels v. Mackell*, 401 U.S. 66 (1971), *Dyson v. Stein*, 401 U.S. 200 (1971), *Perez v. Ledesma*, 401 U.S. 82 (1971), *Boyle v. Landry*, 401 U.S. 77 (1971), and *Byrne v. Karalexis*, 401 U.S. 216 (1971).

The District Court noted that this Court left the question open for future decision as to whether or not the *Younger-Samuels* standard of irreparable injury was applicable to pre-prosecution suits for declaratory relief (A. 40). The District Court, however, applied that standard to petitioner's claim, even though there was no pending state criminal prosecution against him (A. 40). The District Court ruled that Steffel had failed to show irreparable injury or other extraordinary circumstances (A. 41). To rationalize the application of the *Younger-*

[4]The handbill advertised a forthcoming "March Against The War Saturday [October] 31", and called for a "BOYCOTT at COLONIAL STORES, This Inflationary War Continues to Starve Mexican Lettuce Pickers" (R. 15). A Colonial Store was one of the tennants in the Shipping Center (R. 148).

Samuels standard to petitioner's claim, the District Court read *Younger v. Harris, supra,* to counsel lower federal courts "not [to] hypothesize as to what the consequences of a future arrest might be. . ." (A. 41). The District Court further concluded that Steffel's claim lacked the "rudiments of an active controversy" (A. 41). The District Court drew that conclusion from the direction in *Dyson v. Stein, supra,* to the court below on remand to make the requisite *Younger-Samuels* finding and from the lack of standing to challenge an uncharged intimidation statute found in *Boyle v. Landry, supra,* (A. 40). For these two reasons, the merits of petitioner's claim were not reached.

A divided Court of Appeals affirmed the District Court's extension of the *Younger-Samuels* standard to deny declaratory relief in a pre-prosecution case (A. 50). The majority, Circuit Judges Dyer and Gewin, reasoned that,

> "If the practical effects of injunctive and declaratory judgment remedies are identical because they result in the disruption of a state's enforcement of its criminal statutes when a criminal prosecution is pending, and therefore bad faith harassment must be shown before either remedy may issue, and if, as we have seen, the same test of bad faith harassment is prerequisite to injunctive relief in a threatened criminal prosecution, it follows that a like showing must be made for declaratory relief in a threatened prosecution" (A. 48).[5]

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[5]The majority cited student notes relative to the impact of *Younger v. Harris* and *Samuels v. Mackell* from the annual summary and evaluation of this Court's work in an article generally entitled "The Supreme Court, 1970 Term", 85 *Harv. L. Rev.* 304 (1971), to buttress their reasoning.

Senior Circuit Judge Tuttle dissented from the extension of the *Younger-Samuels* standard to close the door to petitioner's claim (A. 50). Judge Tuttle felt that "the facts [did] not justify so broad a decision" and that the decision constituted "federalism turned on its head" (A. 53). Judge Tuttle, however, concurred in the results. He would have affirmed on the authority of *Cameron v. Johnson*, 390 U.S. 11 (1968), since the case did not involve a "facially void statute" and the record did not establish bad faith harassment (A. 55).

On petitioner's motion for rehearing and rehearing *en banc*, the full court was polled and a majority of its members voted not to rehear the appeal (A. 56). Chief Judge Brown and Circuit Judges Wisdom and Goldberg dissented and voted for rehearing. The majority voting against rehearing rejected this Court's decision in *Lake Carrier's Association v. MacMullan*, 406 U.S. 498 (1972), in which there was unanimity among members of this Court that the considerations which animated decisions in the *Younger-Samuels* context "have little force in the absence of a pending state proceedings" 406 U.S. 498. The dissenters noted that the decision was contrary to the law in the First, Third and Sixth Circuits and at odds with earlier decisions in the Fifth Circuit (A. 58). The dissenters were of the opinion "that the case obviously involves a problem of exceptional importance . . . which should have been reconsidered *en banc* "to insure decisional uniformity" (A. 60).

SUMMARY OF ARGUMENT

Petitioner attempted to peacefully distribute handbills along the exterior sidewalks of an enclosed shopping center complex located in Dekalb County, Georgia. Respondents prohibited petitioner from doing so by invoking the provisions of 26 Georgia Code Annotated,

§1503, which provides penal sanctions for trespass to the lands or premises of another. Petitioner sought declaratory relief in the local federal district court to the effect that Section 1503 as applied to his conduct violated his rights under the First Amendment. The district court and the Court of Appeals for the Fifth Circuit applied *Younger-Samuels* standard, announced in recent decisions of this Court, to deny declaratory relief even though there was no prosecution pending against petitioner.

Younger-Samuels did not create new law, *Younger* reaffirmed and reapplied existing principles which federal courts are to use when deciding to grant or deny injunctive relief against a pending state criminal prosecution. The primary thrust of *Younger* was to abort an emerging tendency to expand the occasions when injunctive relief could be granted under the authority of *Dombrowski v. Pfister. Samuels,* likewise, applied similar long-standing principles, respecting the availability of declaratory relief, which has been developed to prevent undue and unseemly federal judicial interference with the enforcement of a state's taxing or licensing powers.

The Court of Appeals below misapplied *Younger-Samuels.* Different considerations and a different standard control the decision to grant or deny declaratory relief in a case, such as this, where there is *no* pending state criminal prosecution. Recent decisions of this Court as well as the legislative history of the Federal Declaratory Judgment Act, reviewed by Mr. Justice Brennan in *Perez v. Ledesma,* clearly establish that a different standard is applicable, where there is no pending state criminal prosecution.

The case is both legally and factually alive. Petitioner is entitled to relief because he was handbilling *outside* the enclosed mall along the exterior sidewalks and thus has a claim under *Marsh v. Alabama.*

This is a proper case for declaratory relief, and petitioner is a proper party to secure such relief. On two occasions, Georgia's trespass law was actually applied to petitioner and his First Amendment activities, and the threat of enforcement of Section 1503 inhibits petitioner's present exercise of rights of free speech.

There is no remedy in the Georgia State courts. Georgia by statutory and decisional law expressly prohibits its courts from exercising their equity powers to grant either injunctive or declaratory relief which would interfere with the administration of its criminal laws. An undesirable impasse results from the denial of declaratory judgment which invites resort to self-help in order that a judicial remedy might become available. Only petitioner has standing to litigate the issue or issues which determine whether or not he is entitled to declaratory relief.

The complaint filed by petitioner alleges facts which show that the case is within the subject matter jurisdiction of the federal district court. If those facts are true, petitioner is entitled to relief. Due to the recent decision of this Court in *Chicago Police Department v. Mosley*, and developments in National Labor Relations Board proceedings, after the commencement of this action, the case is now infused with a real live equal protection claim. Thus, *Cameron v. Johnson* is inapposite.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS MUST BE REVERSED, BECAUSE THE COURT ERRONEOUSLY CONSTRUED *YOUNGER v. HARRIS* AND *SAMUELS v. MACKEL* AS CREATING NEW LAW AND MISAPPLIED THOSE DECISIONS TO DENY DECLARATORY RELIEF IN A CASE IN WHICH THERE WAS NO PENDING STATE CRIMINAL PROSECUTION.

A. No new law was created by the decision of this Court in *Younger v. Harris, supra,* and *Samuels v. Mackel, supra.* Those decisions clarified existing law and reaffirmed venerated principles of judicial self-restraint, where injunctive or declaratory relief is sought against a pending state court criminal prosecution. The Court made it abundantly clear that it was not charting a new course, rather it was adhering to an existing path and disapproving an emerging tendency to meander wrought by *Dombrowski v. Pfister,* 380 U.S. 479 (1965).

The Court reminded lower court judges that the principles which animate the decisions to grant or deny injunctive relief against state criminal prosecutions in the context of "Our Federalism" are those that:

> Ex parte Young, 209 US 123, and following cases have established the doctrine that when absolutely necessary for protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily,

they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. [Citation omitted]

These principles, made clear in the Fenner case, have been repeatedly followed and reaffirmed in other cases involving threatened prosecutions. 401 U.S., at 45.[6]

Dombrowski v. Pfister, supra, introduced a troublesome variation on an established theme. The District Court in *Younger*, relying on *Dombrowski*, had "substantially broadened the availability of injunctions against state criminal prosecutions and that under that decision the federal courts may give equitable relief without regard to any showing of bad faith or harassment, whenever a state statute is found 'on its face' to be vague or overly broad, in violation of the First Amendment". 401 U.S., at 50.[7] Even though there are statements in

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[6]The quoted language is from the unanimous decision of this Court in *Fenner v. Boykins*, 271 U.S. 240, at 243-44 (1926) a familiar precedent of 46 years duration. The "other cases" to which this Court referred and which have been repeatedly followed are: *Spielman Motor Sales Co. v. Dodge*, 294 U.S. 89 (1935); *Beal v. Missouri Pac. R. Co.*, 312 U.S. 387 (1941); *Williams v. Miller*, 317 U.S. 599 (1942); and *Douglas v. City of Jeannette*, 319 U.S. 157 (1943).

[7]Other district courts have similarly construed *Dombrowski v. Pfister, supra*; for example, *Carmichael v. Allen*, 267 F. Supp. 985, at 993 (USDC ND Ga, 1966); and *Hunter v. Allen*, 286 F. Supp. 830, at 835 (USDC ND Ga, 1968), partial denial of relief on the merits aff'd 422 F.2d 1158 (5th Cir., 1970), reversed and remanded *sub nom., Embry v. Allen*, 401 U.S. 989 (1971), for

Dombrowski to support the District Court's construction, the Court rejected the lower court's expansive interpretation of *Dombrowski* for several reasons. First, the statements relied upon by the District Court were "unnecessary to the decision of that case because the Court found that the plaintiffs had alleged a basis for equitable relief under the long-established standards." *Ibid.* 50. Second, "chilling effect" . . . "should not by itself justify federal intervention, because federal injunctive relief cannot satisfactorily eliminate "chilling effect". *Ibid.* Such effect could be regenerated by lifting the injunction, where the state elected to secure "an acceptable limiting construction". *Ibid.* Third, incidental "chilling effect" created by state statutes which might arguably impinge upon First Amendments rights does not in itself justify prohibiting the State from carrying out the important and necessary task of enforcing [its] laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution". *Ibid.*, at 51-52. Fourth, the mode of testing the Constitutionality of a state statute, under *Dombrowski*, had the potential to erode the "case or controversy" requirement of the Judicial Clause of the Federal Constitution. For those reasons, the Court held that *Dombrowski "should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions"*. [Emphasis added] *Ibid.*, at 53. Thus, it is clear that new law was *not* created in *Younger v. Harris.*[8]

consideration of *Younger v. Harris, supra* and *Samuels v. Mackel, supra.*

[8]This conclusion is buttressed by the statement in the separate concurring opinion of Mr. Justice Stewart, in which the late Mr. Justice Harlan joined, that: "The questions the Court decides

In *Samuels v. Mackel, supra,* this Court held that "where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration . . . in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well". 401 U.S., at 73. The principles to which the Court was referring are those which require a showing of "extraordinary circumstances where the danger of irreparable loss is both great and immediate" or bad faith enforcement.

Several considerations, derived from "Our Federalism", factored in *Samuels* to require the same showing for declaratory relief as was required for injunctive relief. There was an analogous and existing body of law which had narrowed the circumstances in which declaratory judgment relief could be granted. In 1943, less than ten years after the enactment of the Federal Declaratory Judgment Act,[9] the Court decided *Great Lakes Dredge &*

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today are important ones. Perhaps as important, however, is a recognition of the areas into which today's holdings do not necessarily extend. In all of these cases, the Court deals with the proper policy to be followed by the federal court when asked to intervene by injunction or declaratory judgment in a criminal prosecution which is contemporaneously pending in state court." *Ibid.*, at 54-55.

Mr. Justice Brennan, White, and Marshall concurred in the result, because they were of the opinion that Harris had not exhausted his state remedies and that the other plaintiffs lacked standing. *Ibid.*, at 57-58. Mr. Justice Douglas dissented, being of the opinoin that the unconstitutionality of the state statutes on its face for any reasons was sufficient to justify injunctive relief. *Ibid.* at 59.

[9] 48 Stat. 955, c. 512, June 14, 1934, as amended and now appearing as 28 United States Code, Section 2201, *supra,* at 2.

Dock Co. v. Huffman, 319 U.S. 293 (1943). There, several employers engaged in maritime operations brought suit against certain Louisiana officials, "seeking a declaratory judgment that the State's unemployment compensation law, which required employers to make contributions to a state compensation fund, was unconstitutional". 401 U.S., at 69. The action was dismissed by the District Court on the grounds that the challenged statute was constitutional. The dismissal was affirmed by this Court on a different ground. This Court held "that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of a declaratory judgment procedure". 319 U.S., at 299. Accordingly, the cause was ordered dismissed by this Court on traditional equitable grounds "without consideration of the merits." *Ibid.*, at 302. The principle of judicial self-restraint announced in *Great Lakes Dredge & Dock Co. v. Huffman* had "been repeatedly recognized and reaffirmed by" the Court in other cases in which declaratory relief was sought against a state tax or licensing statute.[10] 401 U.S., at 71.

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[10] Those cases, which were cited with approval in *Samuels*, are: *Macauley v. Waterman S.S. Corp.*, 327 U.S. 540 (1946), denied declaratory relief sought against renegotiation of "Red Sea" charters, failure to exhaust administrative remedies. 327 U.S., at 544; *Ott v. Mississippi Barge Line*, 336 U.S. 169 (1949), declaratory judgment against state *ad valorem* taxes, adequate state remedy for assessment errors, 336 U.S., at 175; *Public Service Commission v. Wycoff Co.*, 344 U.S. 327 (1952), dissenting opinion of Mr. Justice Douglas, equitable principles authorized relief, 344 U.S., at 253. *Allegheny County v. Mashuda Co.*, 360 U.S. 185 (1959), declaratory relief proper in state eminent domain proceedings based on diversity jurisdiction; *Enochs v. Williams*, 370 U.S. 1 (1962), no declaratory relief against tax assessment; and *H.J. Heinz Co. v. Owens*, 189 F.2d 505 (9th Cir., 1959), state court determination of validity of patent not relitigable in declaratory action.

In *Younger*, the Court noted that Congress, as early as 1793, had "manifested[11] a desire to permit state courts to try like cases free from interference by federal court". 401 U.S., at 43. Partly in response to a similar manifestation[12] of Congressional policy, the Court long before *Samuels* restricted the availability of declaratory relief against the assessment and levy of a state imposed tax. Moreover, whether or not additional relief is sought under Section 2202, 28 United States Code,[13] a declaratory judgment has the potential to disrupt and abort state court proceedings through its res judicata effect. As a practical matter, the res judicata effect of a judgment would prohibit the state court from hearing and deciding *a matter* already pending before it. 401 U.S., at 72. Thus, neither *Younger* nor *Samuels* created new law, rather long-standing, familiar, and time-tested principles were expressly extended to preclude a federal court from granting declaratory judgment relief where the state criminal proceeding is pending prior to the commence-

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[11] The Court cited 1 Stat. 335, c. 22, Section 5, 1793 Act which provided: [N]or shall a writ of injunction be granted to stay proceedings in any court of a state...." 401 U.S., at 43. Comparison with the present provisions of Section 28 United States Code, Section 2283, was invited. *Ibid.*

[12] 28 United States Code, Section 1341 provides:

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." June 25, 1948, c. 646, 62 Stat. 932.

[13] 28 United States Code, Section 2202 provides:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." June 25, 1948, c. 646, 62 Stat. 964.

ment of the federal civil suit. 401 U.S., at 72.

This Court did not decide that the rigid *Younger-Samuels* standard prohibits the grant of declaratory relief against non-pending or threatened state criminal prosecution. Mr. Justice Black wrote:

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceedings is begun." 401 U.S., at 41.

To emphasize the point, Mr. Justice Stewart with whom Mr. Justice Harlan concurred, and who constituted a part of the majority in *Younger v. Harris, supra,* stated, "Finally, the Court today does not resolve the problems involved when a federal court is asked to give injunctive or declaratory relief from *future* state criminal prosecutions". (Emphasis in the original) 401 U.S., at 55.

B. The Court of Appeals erroneously applied the restrictive *Younger-Samuels* standard to affirm the District Court's denial of petitioner's prayer for declaratory relief (A. 44). To reach that result, Judge Dyer, writing for the majority, reasoned as follows:

> "If the practical effects of injunctive and declaratory judgment remedies are identical because they result in the disruption of a state's enforcement of its criminal statutes when a criminal prosecution is pending, and therefore bad faith harassment must be shown before either remedy may issue, and if, as we have seen, the same test of bad faith harassment is prerequisite to injunctive relief in a *threatened* criminal prosecution, it follows that a like showing must be made for declaratory relief in a threatened prosecution." (A. 48).

The reasoning of the majority in the Court of Appeals is buttressed by the erroneous construction of "Justice

Black's discussion of *Dombrowski* [to have] much broader implications, suggesting that even when state proceedings have not yet begun, injunctive relief—as authorized by *Dombrowski*—or declaratory relief—as authorized by *Zwickler v. Koota*, a 1967 case relying heavily on *Dombrowski*—may be conditioned on the same bad faith requirements". (A. 49). As petitioner pointed out above, Mr. Justice Black's discussion of Dombrowski was designed solely to dispel any further notion that mere allegations that a state statute on its face was either vague or overbroad authorizes injunctive relief against either pending or threatened state criminal prosecutions. See 401 U.S., at 50-53.

Indeed, *Zwickler v. Koota*, 389 U.S. 241 (1969), did draw mightily upon *Dombrowski* to overcome the District Court's[14] decision to abstain "from considering [Zwickler's] request for declaratory judgment in the absence of a showing by [Zwickler] of 'special circumstances to justify the exercise of federal court jurisdiction * * * to grant injunctive relief". 389 U.S., at 253-54. *Zwickler* held that, under *Dombrowski*, the same standard is to be applied when declaratory relief is sought against a *pending* state court prosecution, not against a threatened state criminal prosecution. In *Zwickler*, there was no pending state court prosecution; his conviction had already been reversed on state law grounds. Thus, this Court obviously did decide the availability of declaratory relief in the *Zwickler* context; that is, threatened or future state criminal prosecutions.[15]

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[14] See *Zwickler v. Koota*, 261 F. Supp. 985, at 989-91 (USDC ED NY, 1966).

[15] In a similar context, the court reaffirmed the availability of federal declaratory relief. See *Constantineau v. Wisconsin*, 400 U.S. 433 (1971).

The majority quoted an excerpt from the Harvard Law Review[16] out of context to further aid its faulty reasoning (A. 49). The majority failed to grasp the significance of the critical comment in the Law Review Note that Mr. Justice Black's "remarks attacking 'on its face' adjudication were unnecessary and inapt support for the *Younger* holding" 85 Harv. L. Rev., at 311. The majority also ignored other persuasive comments in the Law Review Note and which should have been obvious to them that,

> The *Younger* decision dealt with the question of when and under what circumstances federal intervention in state proceedings was appropriate; it did not deal with what type of adjudication should be employed once the proper forum is determined. *Thus, while a denial of relief in Younger does mean that the defendant's claim will not be entertained in the federal courts, it should not necessarily mean that the claim will not receive overbreadth scrutiny.* For the proper mode of constitutional adjudication is critical, regardless of the forum in which the constitutional claim is ultimately adjudicated. If the rigorous "on its face" approach is required to protect fundamental first amendment interests of the general public adequately, then it should be employed in the state enforcement court as well as in the federal equity hearing. *Ibid.*, at 312.

Hence, the decision of the majority in the Court of Appeals is unsupported by a single significant case precedent of any court other than the Fifth Circuit Court of Appeals[17] or an expression of scholarly approval.

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[16] *Supra*, at n. 5.

[17] The Fifth Circuit is the only circuit which has yet held that *Younger-Samuels* standard was applicable where declarory relief was sought against a threatened criminal prosecution. The "Fifth

The decision of the majority of the Court of Appeals is the product of tautological reasoning which led it to incorrectly extend or apply the *Younger-Samuels* standard to this case. The majority assumes that, since this Court considered the practical effect of granting injunctive or declaratory relief against a pending state prosecution to be the same due to the resulting disruption of a state's enforcement of its criminal laws, "The same limitation on the use of the Act necessarily applies in preprosecution cases" (A. 49). This position and supporting rationale as well was rejected by this Court in *Lake Carriers Association v. MacMullan, supra,* 406 U.S. at 509-510.

There, the Association sought injunctive and declaratory relief against the enforcement of the Water Pollution Control Act of the State of Michigan. The statute provided, *inter alia,* that a violation of its provisions would be punished as a criminal misdemeanor. 406 U.S. at 502. The special three judge district court had held that the complaint failed to state a justiciable controversy and that compelling reasons justified federal abstention.

This Court held that a justiciable controversy was

Circuit Rule" barring relief, usually announced in an uninformative *per curiam* opinion, against threatened criminal prosecutions has been applied in eleven cases other than this one. Those cases are: *Thevis v. Moore,* 440 F.2d 1350 (1971); *Star Satellite v. Rosetti,* 441 F.2d 651 (1971); *Coleman v. Yokum,* 442 F.2d 351 (1971); *Leflore v. Robinson,* 446 F.2d 715 (1971), to withdraw 434 F.2d 933 for reconsideration in light of *Younger*; *Musick v. Johnson,* 449 F.2d 201 (1971), reh. *en banc* den. 449 F.2d at 203; *Cooley v. Endictor,* 458 F.2d 513 (197); *Hunt v. Rodriquez,* 462 F.2d 659 (1972); *Thevis v. Seibs,* 464 F.2d 613 (1972); *Palaio v. McAuliffe,* 466 F.2d 1230 (1972); *Shaw v. Garrison,* 467 F.2d 113 (1972), relief granted requisite showing made; and *Milner v. Burson,* 470 F.2d 870 (1972).

stated but that abstention was appropriate. However, all but one of the District Court's grounds for abstention were rejected. This Court held that abstention was appropriate, because the state court could settle the question of the correct construction of the new act, and possibly avoid the federal question once federal regulations were promulgated. 406 U.S. at 512.

To reach that decision in the context of that pre-state prosecution, this Court in *Lake Carriers Association,* was compelled to consider the implication of *Younger v. Harris,* and *Samuels v. Mackell.* Mr. Justice Brennan found that the stringent post-prosecution tests are inapplicable to a pre-prosecution case:

> "In Younger v. Harris, 401 U.S. 37 (1971), and Samuels v. Mackell, 401 U.S. 66 (1971), this Court held that, apart from the 'extraordinary circumstances, a federal court may not enjoin a pending state prosecution or declare invalid the statute under which the prosecution was brought. The decisions there were premised on consideration of equity practice and comity in our federal system that have little force in the absence of pending state proceeding. In that circumstance exercise of federal court jurisdiction is appropriate if the conditions for declaratory or injunctive relief are met. See generally *Perez v. Ledesma,* 401 U.S. 82, 93 (1971) (separate opinion). 406 U.S. at 509-510.

Indeed, the separate opinion cited with approval is the opinion of Mr. Justice Brennan in *Perez v. Ledesma, supra.* The majority of the Court of Appeals explicitly rejected the principles stated in that separate opinion (A. 49). In fact, this explicit rejection was the basic premise for the decision of the Court of Appeals in this case. Now that this Court has held that the stringent *Younger-Samuels* standard does not apply in a pre-

prosecution suit for declaratory relief, the decision of the Court of Appeals is in direct conflict with and contrary to *Lake Carriers Association.*[18]

Moreover, the dissent by Mr. Justice Powell, joined by the Chief Justice, in *Lake Carriers Association,* further supports petitioner's position that the stringent *Younger-*

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[18] In his special concurring opinion on the denial of rehearing *en banc,* Judge Dyer for the majority attempted to distinguish the determination in *Lake Carriers Association* that *Younger-Samuels* was inapplicable to pre-prosecution cases as "collateral dicta" and characterized Mr. Justice Brennan's analysis as a "gratuitous statement" (A. 57). Chief Circuit Judge Brown for himself, Circuit Judges Wisdom and Goldberg responded by noting that the dissents in *Lake Carriers Association* negate any inference that this Court "regarded *Younger* as a possible bar to a declaratory judgment in the absence of a pending state criminal proceeding" (A. 59). Judge Dyer found Chief Judge Brown's citation of *Hobbs v. Thompson,* 448 F.2d 456 (5th Cir. 1971), to be "inexplicable" (A. 57). In his view, *Hobbs* "is a civil case . . . involving no possibility of interference with state criminal proceedings" (A. 57).

A threshold issue in *Hobbs* was "the propriety of federal equitable intervention" in an action brought by municipal employees to be relieved of impediments raised by local ordinances to the exercise of First and Fifteenth Amendment rights. 448 F.2d, at 458. Judge Goldberg carefully examined the various limitations which have been imposed upon federal court intervention into local matters and approved the conclusion reached by Mr. Justice Brennan in *Perez.* 448 F.2d, at 465. The ordinances attacked in *Hobbs* provided quasi-criminal penalties of "reprimand, deduction of pay, suspension from duty, reduction in rank, dismissal from the department" for such conduct as taking "an active part in any primary election . . . identifying . . . in a political race with or against any candidate for office." 448 F.2d, at 457. Indeed, relief from the imposition of state criminal sanctions was not sought, but the interest of the city in preventing corruption among its firemen is one certainly no less entitled to "prompt and unencumbered enforcement" of the degree a state has with respect to its criminal laws. See Mr. Justice Stewart's concurring opinion in *Younger v. Harris,* 401 U.S., at 55 n. 2.

Samuels standard was inapplicable to this pre-prosecution action for declaratory relief.

Mr. Justice Powell's dissent holds the view that the complaint did state a justiciable controversy, and that therefore, the three judge district court, rather than have abstained, should have reached the merits and decided the issue before it. 406 U.S. at 513. Of necessity, the dissent involves approval and endorsement of the Court's majority opinion in Lake Carriers Association that the stringent *Younger-Samuels* standard is not applicable in the pre-prosecution context.

The Court continued to limit application of the *Younger-Samuels* standard to pending prosecutions in the recent abortion cases. In *Roe v. Wade*, ___ U.S. ___ (1973) (41 U.S.L.W. 4213), Mr. Justice Blackmun applied *Younger-Samuels* standard to preclude federal injunctive or declaratory relief for Dr. Hallford, because he sought "relief with respect to the same statutes under which he stands charged in criminal prosecutions *simultaneously pending* in state court" 41 U.S.L.W., at 4217. [Emphasis added]. However, the Court sanctioned the grant of declaratory relief to plaintiff Roe against whom there was no pending state prosecution. For, "[t]he Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. *Zwickler v. Koota* . . .; *Dombrowski v. Pfister* . . . We are not dealing with a statute, that, on its face, appears to abridge free expression, an area of particular concern under *Dombrowski* and refined in *Younger v. Harris* . . ." 41 U.S.L.W., at 4229.

In the other abortion case, declaratory relief was available to the physicians who were subject to possible future criminal prosecution for consulting with pregnant

women who desired abortions. *Doe v. Bolton*, ___ U.S. ___ (1973) (41 U.S.L.W. 4233). The Court said:

> The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief. *Crossen v. Breckenridge*, 446 F.2d 833, 839-840 (CA6 1971); *Poe v. Menghini*, 339 F. Supp. 986, 990-991 (Kans. 1972). 41 U.S.L.W., at 4236.

The Court pointed out that injunctive and declaratory relief do not have the identical impact or effect upon federal-state relations. Mr. Justice Blackmun concluded both opinions with almost identical language to the effect that, "We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional." *Roe v. Wade*, 41 U.S.L.W., at 4229. And, in Doe v. Bolton, "The appellants complain, finally, of the District Court's denial of injunctive relief. A like claim was made in *Roe v. Wade, ante.* We declined decision there insofar as injunctive relief was concerned, and we decline it here. We assume that Georgia's prosecutorial authorities will give full recognition to the judgment of this Court." 41 U.S.L.W., at 4240.

However, if the Court had had before it cases involving pending state criminal prosecution, its statements would have little practical meaning. Where the prosecution is pending, if injunctive relief is granted, negative or mandatory directions are actually imposed upon state

officials. The relief granted would *compel* them, with respect to the enforcement of the state's criminal laws, to conform their conduct to what any one of several hundred different federal district court judges might order, under the threat of contempt proceedings. If declaratory relief were granted, its effect would be to generate strife rather than operate as "an essential instrument of social peace." See Borchard, "Judicial Relief for Peril and Insecurity," 45 Harv. L. Rev. 793, at 801 (1931-32). But, where, as here, there is no pending state criminal prosecution, there is simply nothing cognizable to be disrupted by the grant of declaratory relief. Inchoate state enforcement activity may very well have to be adjusted, but the disruption which *Younger-Samuels* discountenanced is: the wrenching away from the state courts the power to hear and decide matters which have been reserved to them under the Constitution, not those which are the prime responsibility of the federal courts, under "Our Federalism." In the pre-prosecution situation, the effect of withholding federal declaratory relief is as Judge Tuttle stated "federalism turned on its head" (A. 53). "Our Federalism" is a two-way street. Accordingly, federal judges, as Judge Tuttle admonished, cannot abdicate their duty "to decide what is solely a federal question" (A. 53).[19]

[19] The legislative history of the Federal Declaratory Judgment Act, which Mr. Justice Brennan reviews in his separate concurring opinion in *Perez v. Ledesma*, 401 U.S., at 112-25, leaves little doubt that declaratory relief was conceived of as a milder remedy to prevent anticipatory invasions of federal Constitutional rights. Other lower federal courts have also perceived this to have been the intent of Congress to provide a remedy which would effectively avoid the direct, immediate conflict between federal and state authority caused by injunctive relief while permitting federal vindication of federal Constitutional rights. Only the Fifth Circuit,

II.

THE JUDGMENT BELOW MUST BE REVERSED, BECAUSE THIS IS A PROPER CASE FOR THE GRANT OF DECLARATORY RELIEF AND PETITIONER IS A PROPER PARTY FOR SUCH RELIEF

A. This Is a Proper Case for the Grant of Declaratory Relief

This is a "classic case for declaratory relief". *Lake Carriers Association v. MacMullan*, 406 U.S. 498, 513, Justice Powell's dissenting opinion. The district court asserted the lack of the "rudiments of an active controversy between the parties" as alternative bases for its decision. The District Court was incorrect. An active and lively controversy existed between Steffel and the respondents. Steffel had been subjected to actual applications of the Georgia trespass statute on two occasions, October 8 and 10, 1970 (A. 8, 9). Steffel's departure was required by the statute. See 26 Ga. Code Ann., Sec. 1503, *supra*, at 2. Had he refused to leave or had returned, he would have been arrested. Steffel's

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even though one would have expected that regional peculiarities might have made that court more chary to close yet another door to federal relief, has adopted a contrary view. Some of the decisions of other lower federal courts are: *Wulp v. Corcoran*, 454 F.2d 826 (1 Cir. 1971); *Lewis v. Kugler*, 446 F.2d 1343 (3 Cir. 1971); and *Crossen v. Breckenridge*, 446 F.2d 833 (6 Cir. 1971). It is also contrary to decisions of district courts in the Second Circuit: *Anderson v. Vaughn*, 327 F. Supp. 101 (D. Conn., 1971); and *Thoms v. Smith*, 334 F.Supp. 1203 (D. Conn., 1971).

In *Crossen v. Vaughn, supra*, a challenge to Kentucky's anti-abortion laws, decided June 23, 1971, *Younger v. Harris, supra*, and *Samuels v. Mackell, supra*, were not even cited by Circuit Judge Miller. Crossen applied the *Zwickler v. Koota*, standard. 446 F.2d, at 841. In *Lewis v. Kugler, supra*, an action on behalf of, among others, "long-haired highway travelers, the Third

compliance with the statute was coerced by the risk of enforcement. Obediance to law works its application as well as defiance. Surely, Steffel is not required to resort to civil disobediance to obtain standing. Steffel was under a present obligation not to return to the Shopping Center for the purpose of passing out handbills. As this Court said in *Lake Carriers Association* "that in and of itself makes [his] attack on the validity of the law a live controversy, and not an attempt to obtain an advisory opinion." 406 U.S. at 507. Furthermore, the District Court found that respondents, Hudgins and Reynolds, "will continue to insist on the strict enforcement of their regulations, and, therefore, will repeatedly swear out warrants for [Steffel's] arrest, and pursue active prosecution under the trespass statute" (A. 38).

A declaration of rights would be beneficial to the petitioner. A substantial question is presented on the merits of the controversy as to the extent the owner of private property must tolerate First Amendment activity

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Circuit expressly held that *Younger-Samuels* standard "is not applicable to situations where no prosecution is pending in state courts. . ." 346 F.2d, at 1347. In the Connecticut red flag case, *Anderson v. Vaughn*, Circuit Judge Smith for the majority of the three Judge district court panel held that *Younger-Samuels* were not controlling since there was no "criminal prosecution pending . . ." 327 F. Supp., at 102. Judge Clarie dissented, on the merits; he thought the statute valid. Judge Blumenfeld in the Connecticut flag defiling case, *Thoms v. Smith, supra*, did not apply *Younger-Samuels* "because there is no pending prosecution . . ." 334 F. Supp., at 1200. Judge Clarie would have abstained on the basis of *Younger*, since another person who had been convicted in state court under the challenged statute, had appealed. 334 F. Supp., at 1216. The majority pointed out that abstention was equally improper, since there were no privity or interest nexus between the federal litigants and the state court appellant. 334 F. Supp., at 1206 n. 4.

on the *plainly* public portion of his property. This Court has never held that a person could be deprived of the right to peacefully handbill on the *exterior* sidewalks of privately-owned property generally accessible to the public. A Jehovah's Witness' right to distribute leaflets along the public sidewalks of a company town was upheld in *Marsh v. Alabama;* 326 U.S. 501 (1946). "Ownership does not always mean absolute dominion." 326 U.S. at 506.

In *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968), this Court imposed a restriction upon the use to which strangers could make of private property open to the general public. There, the Court required some nexus between the First Amendment activity and the occupiers and owners of private property. The nexus in *Amalgamated Food Employees Union* was picketing to inform the public of the use of non-union labor by one of the tenants of the shopping Center. One could consider the restriction reasonable, since the "picketing was carried on almost entirely in the parcel pickup area and the portion of the parking lot immediately adjacent thereto." 391 U.S., at 311. The potential for interference and disruption could be a reasonable basis for limiting the range of activity which would be protected. However, *Chicago Police Department v. Mosley,* ___ U.S. ___ (1972) (40 U.S.L.W. 4877), greatly undermined the business nexus rationale. In *Chicago Police Department,* a Chicago ordinance which permitted only union picketing near a public school was declared to be a denial of the equal protection of the law. Another restriction was imposed upon peaceful picketing/handbilling by *Lloyd Corp. Ltd. v. Tanner,* ___ U.S. ___ (1972) (40 U.S.L.W. 4829). *Lloyd Corp. Ltd.* held that the owner of a large shopping center could exclude peaceful handbillers from

the "distribution of handbills *within* the building complex and its malls". 92 S.Ct. 2219, at 2222. (Emphasis added). That case did not hold that peaceful handbillers could be excluded from the use of *exterior* sidewalks. One of the supporting rationales for *Lloyd Corp. Ltd.* was the availability of reasonable adequate alternative sites from which handbills could be distributed which would reach patrons entering or leaving the shopping center complex. Mr. Justice Powell took special care to point out that, "All persons who enter or leave the private areas within the complex must cross public streets and sidewalks, either on foot or in automobiles ... Handbills may be distributed conveniently to pedestrians, and also to occupants of automobiles, from these public sidewalks and streets". 92 S.Ct. 2228. Since the court below did not reach the merits, it would be an appropriate disposition to remand for a finding whether or not the exterior sidewalks from which petitioner was excluded are sufficiently dedicated to the public as to permit the exercise of First Amendment rights.[20]

There is no remedy available to Steffel in the State of Georgia, unless he defied the law by either remaining on the premises or returning after having been told to leave.

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[20] The District Court would not be adrift with respect to the appropriate standard to apply to reach its determination of whether or not declaratory relief is proper in the context of the history of this preprosecution action. This Court has already established a number of devices to prevent abuse of the lower Court's equitable powers; for instance: abstension, case or controversy, imminence of prosecution or standing. What must be borne in mind is that the applicable principles are judicially created and, therefore, are completely subject to judicial control. They may be expanded or restrictured to meet the exigencies of each case so that a proper balance is maintained between federal and state interests.

Georgia has enacted a Declaratory Judgment Act, 110 Ga. Code Ann., Section 1101, *et seq.* However, decisions of the Georgia Supreme Court have made it clear that the Act is not available to vindicate rights threatened by the enforcement or operation of criminal statutes or ordinances. *Royal Peacock Social Club v. City of Atlanta*, 226 Ga. 817, 177 S.E.2d 664 (1970); *Clark v. Karrh*, 223 Ga. 851, 159 S.E.2d 75 (1968).

By statute, the powers of equity courts in Georgia may not be exercised to interfere in the administration of the state's criminal laws by either granting injunctive or declaratory relief. 55 Ga. Code Ann., Sec. 102, provides:

> Equity will take no part in the administration of the criminal law. It will neither aid criminal courts in the exercise of their jurisdiction, nor will it restrain or obstruct them.

See *Butler v. Ellis*, 203 Ga. 683, 47 S.E.2d 861 (1948), "declaratory judgment action would not lie ". . . to determine criminal liability for serving liquor to private club member.

The decision below is a standing invitation to breach the peace. An impasse has been created. Neither petitioner nor the respondents have a remedy. Respondents cannot vindicate their position, unless they violate the law by arresting petitioner on sight should he return to the shopping center or arresting him if he should linger too long following a request to desist his handbilling. Likewise, petitioner cannot vindicate his constitutional rights unless he violates the law. Access to the Courts becomes dependent upon wrongdoing. Respondents' position has more than cast a "chilling effect" over petitioner's rights; it placed them in deep freeze. The maintenance of this ironic status quo is an intolerable expense to precious First Amendment freedoms. The

Federal Declaratory Judgment Act is the remedy intended to break this impasse. Its remedial purpose is to "bring about the public guaranty of the reign of law and the private vindication of legal rights." 45 Har. L. Rev., at 801.

Moreover, the immersion of this Court in the sit-in cases during the mid-sixties should be sufficient counsel against the wisdom of infusing notions of civil disobedience into the law. Civil disobedience is sanctioned here when the doors of federal court are closed to petitioners, leaving the property of respondents and the jails of the state as forums in which to assert their constitutional rights. Civil disobedience brings about an increased risk of violence, with prospective inconvenience to the general public, and inevitable economic losses due to business interruption from the loss of patronage or increased insurance premiums. Consider *State of Georgia v. Rachel,* 384 U.S. 780 (1966), in which this Court held that Title II of the Civil Rights Act of 1964 immunized nonviolent refusals to leave the premises of another for racial reasons. But, there is no equivalent statute in the area of handbilling and picketing.

Self-help to resolve the impasse is plainly foreseeable. Georgia's trespass statute, Section 1503, *supra,* at 3, is not a moribund enactment. Section 1503 was enacted in 1968 to replace former Georgia Code Sections 26-3002 through 26-3005. Committee Notes, *Code of Georgia, Annotated,* Chapter 26-15, "Criminal Damage to Property", 99-101. "The general import of [this] section is that a person must receive notice before he is guilty of criminal trespass". *Ibid.,* at 101. Section 1503 supersedes in its entirety former Section 3005, which was deeply implicated in Georgia's resistance to the movement to eradicate racism in places of public accommodation. This Court twice considered the enforcement practices under

former Section 3005 in *State of Georgia v. Rachel, supra,* the civil rights removal action; and in *Walker v. Georgia,* 381 U.S. 355 (1965), criminal conviction on direct appeal. Thus, it is unlikely that respondents will desist from further enforcement of such a recently enacted statute, incorporating as it does a widely used prior law.

B. Petitioner Is a "Proper Party" for Declaratory Relief

One element of an active controversy is whether the plaintiff is a proper party. This question concerned the Court in *Boyle v. Landry, supra.* While there were criminal prosecutions pending against some of the plaintiffs in *Boyle,* the Court's opinion turned on the absence of a showing of irreparable injury to any plaintiff because of any enforcement of the Illinois intimidation statute (the only statute before the Court on appeal). The Court noted that, "Not a single one of the citizens who brought this action had ever been prosecuted, charged, or even arrested under the particular intimidation statute which the court below held unconstitutional." 401 U.S., at 80. The Court stated further that, "In fact, the complaint contains no mention of any specific threat by any officer or official of Chicago, Cook County, or the State of Illinois to arrest or prosecute any one or more of the plaintiffs under that statute either one time or many times." 501 U.S., at 81. The infirmity of the plaintiffs' case in *Boyle* was not that federal court relief would interfere with any pending state prosecution but that none of the plaintiffs, for the reasons above stated, was a proper party to bring the lawsuit.

This holding was consistent with the Court's consideration of "proper party" in *Younger.* There, the Court analyzed the standing of Harris' co-plaintiffs, who had

not been "indicted, arrested, or even threatened by the prosecutor." The Court stated that "if these three had alleged that they would be prosected for the conduct they planned to engage in, and the District Court had found this allegation to be true either on the admission of the State's district attorney or on any other evidence–then a *genuine controversy* might be said to exist." 401 U.S., at 42 (emphasis added). As to those three proposed plaintiffs, the Court then concluded that their fears of state prosecution were imaginary and speculative.

Petitioner meets the "proper party" test stated in *Younger* and applied in *Boyle.* He alleges in his complaint that he will be arrested and prosecuted for criminal trespass if he were to return to the North DeKalb Shopping Center and distribute leaflets (A. 9). Furthermore, at the hearing, he testified that he had been to the Shopping Center on prior occasions to distribute leaflets and that each time the only reason he did not persist was that he was threatened with arrest if he failed to leave the premises. (R. 139-40, 144-145). The arrest of Ms. Becker when she refused to leave the shopping center confirms the validity of petitioner's fears. Nothing in the record controverts his allegations or testimony of threatened arrest, and therefore, under the *Younger* test, he is an appropriate party with a "genuine controversy". The *Boyle* opinion merely serves as an example of the *Younger* test, and in *Boyle* a sufficient controversy for determination was absent only because nothing in the record suggested threatened arrests under the challenged statute.

Ms. Becker, a plaintiff below, who was arrested could not and cannot assert petitioner's interests in the state court criminal proceedings. Neither an acquittal or conviction of Ms. Becker would aid petitioner. There are

too many variables in a criminal trial (e.g. credibility of witnesses or the sufficiency of the evidence to support a request for instruction to identify but two) so neither petitioner nor the Court should entertain a realistic expectation that such a trial would settle the issue of federal Constitutional law presented in this action. The judgment of conviction or acquittal following a state court trial, unless appealed, which Ms. Becker may not care to do, would have neither *res judicata* nor *stare decisis* value to the petitioner.[21] Ms. Becker does not even have arguable standing to litigate the issues the petitioner must raise to vindicate his rights. She was arrested and charged under Section 1503(b)(3), *supra,* at 2, remaining on the premises after notice to depart. Petitioner, on the other hand, was and is threatened with arrest under Section 1503(b)(2), re-entry after notice that entry is forbidden. Further, regardless of whether or not petitioner is ever arrested, charged, and tried for trespass, the statute adversely impacts in a real and concrete way upon his First Amendment rights. The continued operation and threatened enforcement of Section 1503(b)(2) deprives petitioner of a desirable location, otherwise available to the public at large, at which he may engage in First Amendment activity. In the abortion cases, the Court recognized that the situational relationship of the respective parties to the controversy was dispositive of their entitlement to declaratory relief against threatened state criminal prosecutions.

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[21] There is no *res judicata* effect of civil court litigation on criminal prosecutions. See *Helvering v. Mitchell,* 303 U.S. 391 (1938). The Fifth Circuit has recognized and followed this rule. See *Tomlinson v. Lefkowitz,* 334 F.2d 262, 264 (5th Cir. 1964) and *Young & Co. v. Shea,* 397 F.2d 185 (5th Cir. 1968).

III.

CAMERON v. JOHNSON IS INAPPLICABLE TO THIS CASE, BECAUSE PETITIONER STATED A CLAIM FOR WHICH DECLARATORY RELIEF MAY BE GRANTED

Petitioner claimed that he was engaged in the Constitutionally protected activity of distributing handbills "on an exterior sidewalk of the North Dekalb Shopping Center" on October 8th and October 10th of 1970 "inviting people to 'March Against the War' " (A. 8). He alleged that his handbilling activity was "quiet, peaceful, and orderly, and did not interfere with the selling activities of the shopping center" (A. 8). Petitioner alleged that there was no littering (A. 8). The complaint further alleged that petitioner was prevented from carrying on his peaceful activities by DeKalb County Policeman who threatened to arrest him if he did not leave the premises as ordered by the manager of the shopping center (A. 8). Steffel alleged that he desired to return to the premises and handbill but was afraid to do so for fear that he would be arrested under the provisions of Section 1503, 26 Ga. Code Ann., *supra*, at 2. He prayed for a declaration that the enforcement of the Georgia anti-trespass statute violated his rights under the First Amendment (A. 12). The jurisdiction of the Court was invoked under the provisions of 28 United States Code, Section 1343, and 42 United States Code, Section 1983 (A. 5). These allegations were sufficient to state a claim "arising under" the Constitution and laws of the United States. See *Hague v. CIO*, 307 U.S. 496 (1939), and *Truax v. Raich*, 239 U.S. 33 (1915); and *Crane v. Johnson*, 242 U.S. 339 (1917).[22]

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[22] This case is now infused with an equal protection claim. In a proceeding before the National Labor Relations Board, respondent

Contrary to Judge Tuttle's view, *Cameron v. Johnson*, 390 U.S. 11 (1968), is not applicable to this case. *Cameron* held that relief was properly denied where the petitioners failed to show the existence of a facially vague or overbroad statute and where the evidence at the hearing did not show irreparable injury or bad faith enforcement. See 390 U.S., at 616-21. *Cameron* was not concerned with the question of whether declaratory relief was appropriate against threatened state criminal prosecutions.[23]

Scott Hudgens conceded that labor pickets "had a right to utilize the parking areas and sidewalks surrounding the enclosed mall, but not the "enclosed mall" itself. *Scott Hudgens, an Individual and Local 315, Retail, Wholesale & Department Store Union, AFL-CIO,* Decision and Order, Case 10-CA–8823, August 16, 1971, at 6, 192 NLRB No. 111. This Court has squarely held that a distinction could not be drawn and maintained in favor of labor organizations, with respect to the right to exercise First Amendment rights in places openly accessible to the general public. *Chicago Police Department v. Mosley, supra.*

[23] In *Cameron,* there was active litigation in the state courts. The petitioners there had challenged their arrests in state court by filing affidavits to quash on the grounds that the statute was unconstitutional. Thus, the District Court abstained on the grounds that the petitioners had an adequate remedy at law. *Cameron v. Johnson,* 244 F. Supp. 846 (USDC SD Miss., 1964).

CONCLUSION

For the foregoing reasons, the decision below should be reversed and remanded with directions to grant petitioner and members of his class a hearing to determine the appropriateness of granting the relief sought on the merits.

Respectfully submitted,

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